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State v. Daniels Appellant's Brief Dckt. 47481

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 47481-2019**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR01-19-10123**
v.	)	
	)	
JOHN HUEY DANIELS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE THOMAS J. RYAN
District Judge

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STATEMENT OF THE CASE

Nature of the Case

During John Huey Daniels' jury trial for felony aggravated battery, Mr. Daniels cross-examined a detective about how Mr. Daniels had characterized the alleged victim. The detective answered that Mr. Daniels had characterized the alleged victim as a gang member, but also volunteered that Mr. Daniels identified himself as a former prison gang member. That voluntary statement came after voir dire had revealed that two members of the jury were current or former employees of the Idaho Department of Correction (IDOC). Mr. Daniels filed a motion for a mistrial based on the prejudice from the detective's volunteered statement, but the district court denied the motion for lack of prejudice and for invited error.

In this appeal, Mr. Daniels asserts the district court committed reversible error when it denied his motion for a mistrial. The detective's voluntary statement was not invited error, because the statement was nonresponsive. When viewed in the context of the full record, the detective's voluntary statement constituted reversible error.

Statement of the Facts and Course of Proceedings

Multiple Garden City and Boise police officers responded to a reported shooting in the area of 44th Street and Chinden Boulevard in Garden City. (*See* Tr., p.156, L.3 – p.157, L.2, p.201, L.18 – p.202, L.21, p.238, L.15 – p.239, L.8.) One of the officers arrived at a trailer home in that area, found Chris Anderson with two wounds on his upper abdomen, and accompanied Mr. Anderson to the hospital. (*See* Tr., p.157, L.21 – p.159, L.19.) Mr. Anderson had an entry wound and a burn wound on his abdomen, consistent with being shot once by a gun. (*See* Tr., p.193, L.4 – p.194, L.15, p.218, Ls-18-25.) Doctors retrieved a bullet from his abdomen.

(*See* Tr., p.195, Ls.8-19, p.219, Ls.1-16.) Mr. Anderson had a hole in his stomach, and the bullet was close to going into his heart. (*See* Tr., p.196, L.4 – p.197, L.3.)

Another officer en route received information that a suspect was possibly driving a pickup truck away from the area of the incident. (*See* Tr., p.202, L.22 – p.203, L.1.) That officer saw a truck matching the description on Chinden Boulevard, and eventually stopped it. (*See* Tr., p.203, L.2 – p.204, L.25.) Mr. Daniels was the driver of the truck, and Naomi Hernandez was the only passenger. (*See* Tr., p.210, L.24 – p.211, L.10, p.369, Ls.7-11.) During the stop, Mr. Daniels told officers there was a gun in the passenger door panel of the truck. (*See* Tr., p.243, Ls.4-12. *See generally* State's Ex. 25 (body camera footage of the stop).) Officers then found the gun in the passenger door panel. (*See* Tr., p.243, Ls.13-17.)

A detective for the Garden City Police Department testified that the bullet recovered from Mr. Anderson was very similar to the bullets found in the gun's magazine. (*See* Tr., p.241, L.13 – p.242, L.4.) The gun was a 9mm, but the bullets were .380, a wrong caliber for that type of gun. (*See* Tr., p.242, Ls.5-11.) However, the detective testified that .380 rounds could be fired once from a 9mm gun, but the gun would not eject the case. (*See* Tr., p.242, Ls.12-21.)

Detective O'Gorman testified that he conducted a gunshot residue test on Mr. Daniels at the police station, and then he interviewed Ms. Hernandez. (*See* Tr., p.268, L.2 – p.269, L.20.) He subsequently advised Mr. Daniels of his *Miranda* rights, and Mr. Daniels agreed to speak with him. (*See* Tr., p.269, Ls.20-25. *See generally* State's Ex. 23 (video recording of the interview with Mr. Daniels).) At first, Mr. Daniels was adamant that he had not been involved in a shooting, but after Detective O'Gorman told him in a "ruse" that the gunshot residue test had already shown gunshot residue was on his hand, Mr. Daniels stated he had fired a handgun the

evening before. (*See* Tr., p.270, Ls.1-22.) Per the detective, Mr. Daniels later admitted that story was false. (*See* Tr., p.270, L.23 – p.272, L.6.)

Detective O'Gorman testified that Mr. Daniels told him he was at a friend's house at the time of the incident. (*See* Tr., p.272, Ls.7-15.) Mr. Daniels stated he had not been involved in an altercation, and did not have a gun in his possession. (*See* Tr., p.272, L.24 – p.273, L.14.) The detective went back to Ms. Hernandez's interview room, before he returned to Mr. Daniels and stated that he knew Mr. Daniels had been involved in a shooting. (*See* Tr., p.273, L.15 – p.274, L.4.) Detective O'Gorman testified that Ms. Hernandez's account of what had happened had changed, and she had made statements contrary to the statements Mr. Daniels had made. (*See* Tr., p.273, Ls.21-23, p.294, Ls.12-20.) Detective O'Gorman testified that Mr. Daniels then changed his story, stating he had a handgun and had been involved in a shooting. (*See* Tr., p.274, Ls.4-17.) Mr. Daniels testified that he did not tell Detective O'Gorman up front what had happened in the house, because he was scared. (*See* Tr., p.427, Ls.3-13.)

According to Detective O'Gorman, Mr. Daniels stated he went to the house with the gun to help Jeff Mangum retrieve some money, but he tried to leave before entering the house when he realized the house was Mr. Anderson's. (*See* Tr., p.274, L.18 – p.275, L.22.) Mr. Daniels stated that, inside the house, Mr. Anderson and Mr. Anderson's cousin struck him. (*See* Tr., p.277, L.17 – p.278, L.3.) However, Detective O'Gorman testified he did not see any marks on Mr. Daniels consistent with being hit, and Mr. Daniels pointed out during the interview that he had no marks. (*See* Tr., p.278, Ls.6-14.) Mr. Daniels stated he removed the pistol from his rear pocket, and it went off when he was hit. (*See* Tr., p.279, Ls.17-20.) The detective testified that, for much of the interview, he repeatedly offered Mr. Daniels paths to self-defense, but Mr. Daniels did not take them. (*See* Tr., p.288, Ls.8-12.)

Ms. Hernandez testified that she and Mr. Mangum went into Mr. Anderson's house before Mr. Daniels, and Mr. Anderson was upset because Mr. Mangum brought people into the house. (*See* Tr., p.361, L.1 – p.362, L.16.) She testified that Mr. Anderson got mad at Mr. Daniels when he entered the house, but Mr. Daniels remained calm. (*See* Tr., p.363, Ls.5-12.) She also saw a big knife or machete on a coffee table. (*See* Tr., p.366, L.21, p.367, L.7.) However, Detective O'Gorman testified that Ms. Hernandez did not mention a machete in her police interview. (*See* Tr., p.330, L.16 – p.331, L.13.) A crime scene investigator for the Garden City Police testified that she recalled seeing a machete type knife or sword in the house while assisting with a search warrant following the incident. (*See* Tr., p.234, L.7 – p.235, L.11.) Detective O'Gorman testified that he saw a blade that looked more like a sword than a knife in the house. (*See* Tr., p.316, L.16 – p.317, L.6.)

Ms. Hernandez testified that Mr. Anderson and another man hit Mr. Daniels. (*See* Tr., p.363, L.16 – p.264, L.6.) However, Detective O'Gorman testified that Ms. Hernandez, in her police interview, described one person attacking Mr. Daniels. (*See* Tr., p.495, Ls.2-12.) Ms. Hernandez testified she heard one or two shots, but did not see who had the gun or if there was a gun at all. (*See* Tr., p.368, L.18 – p.369, L.6.) Alisha Clark, who had been in the house before Mr. Daniels arrived, testified that she turned away from the fighting, heard a loud shot, and then heard Mr. Anderson say he had been shot. (*See* Tr., pp.168, L.12 – p.169, L.9.)

The State charged Mr. Daniels by Information with felony aggravated battery with a use of a firearm or deadly weapon during the commission of a crime sentencing enhancement. (R., pp.26-27, 33-34.) The State later charged Mr. Daniels with a persistent violator sentencing enhancement. (R., pp.43-44.) Mr. Daniels pleaded not guilty, and exercised his right to a jury trial. (*See* R., pp.31-32, 45, 69-85.) Mr. Anderson did not testify at the trial. (*See generally* Tr.)

During cross-examination, Detective O'Gorman testified that Mr. Daniels in his interview characterized Mr. Anderson "to be a member of something." (*See* Tr., p.313, Ls.19-22.) Defense counsel and Detective O'Gorman then had the following exchange:

Q. And what was that?

A. He classified him as being a member of the SVC, Which is a gang.

Q. Okay.

A. Daniels also identified himself as an Aryan Knight dropout.

Q. Okay. So are you familiar with those two gangs and the animosity between the two?

A. Yes, sir.

(Tr., p.313, L.23 – p.314, L.9.) Detective O'Gorman then testified that the prior incident was from Mr. Anderson claiming Mr. Daniels had stolen from SVC. (*See* Tr., p.314, L.20 – p.316, L.15.) During redirect examination, Detective O'Gorman clarified that Mr. Daniels was referring to himself as an Aryan Knight dropout. (Tr., p.331, Ls.14-22.)

After the detective finished his testimony, defense counsel noted that two current or former IDOC employees had been seated on the jury panel. (*See* Tr., p.336, Ls.4-15.) Mr. Daniels' counsel asserted that, when he asked Detective O'Gorman about the SVC gang, "the witness also volunteered that Mr. Daniels relayed to him that he was an Aryan Knight dropout." (Tr., p.336, Ls.17-21.) Defense counsel asserted: "Both of these gangs are prison gangs. They're well known in the prison. And so now that this has come to light about Mr. Daniels, these two jurors know that he's either been to prison or is in prison. And because of that, I'm moving for a mistrial." (Tr., p.336, L.23 – p.337, L.2.)

In requesting a mistrial, defense counsel referred to the current or former IDOC employees or "two jurors," Jurors 3 and 10. During voir dire, Juror 3 stated he had formerly

worked for IDOC for ten and one-half years, as a food service officer, correctional corporal, and finally a correctional shift commander, investigator. (*See* Tr., p.32, Ls.5-18, p.91, L.19 – p.92, L.8.) As an investigator, Juror 3 had conducted fact findings and looked into rule violations. (*See* Tr., p.92, Ls.12-16.) Juror 3 described his duties as, "Anything as simple as just a basic, you know, finger pointing to something that could go as far as conducting a criminal investigation for a felony." (Tr., p.92, Ls.16-18.) Juror 10 was currently an IDOC computer lab instructor, who maintained an inmate network for student learning. (*See* Tr., pp.33, Ls.9-22, p.92, Ls.19-24.) Juror 10 was not involved in disciplinary investigations, but could "write out disciplinary reports if they commit some sort of offense in the classroom." (Tr., p.92, L.25 – p.93, L.5.) Jurors 3 and 10 both sat on the jury panel. (Tr., p.133, Ls.14-22.)

The State responded to Mr. Daniels' request for a mistrial by arguing that it did not intend to mention the Aryan Knights again, and the defense had elicited the testimony during cross-examination. (*See* Tr., p.337, Ls.4-15.) The State also argued, "And I think it was elicited fairly given the context of the question and it was within the ambit of the answer that was sought by defense counsel regarding animosity between gangs, a prior theft of SVC's property or drugs or something else." (Tr., p.337, Ls.15-21.)

Mr. Daniels' counsel replied, "I did not ask specifically what Mr. Daniels associated himself with or had been associated with." (Tr., p.338, Ls.4-6.) Defense counsel admitted that asking a follow-up question, "may have been error on my part." (*See* Tr., p.338, Ls.7-8.) However, defense counsel asserted, "there's now an issue that Mr. Daniels has a claim now this jury is prejudiced and they cannot be fair in determining his guilt or innocence because of the knowledge of these gangs in prison." (Tr., p.338, Ls.10-14.) The State contended that

mentioning that Mr. Daniels was formerly in a prison gang did not rise to the level of prejudice required for a mistrial. (*See* Tr., p.338, L.18 – p.339, L.1.)

The district court thought "it would have been fair to maybe further voir dire those prospective jurors that have experience with the Department of Correction and explore what their duties and obligations were and whether or not they are familiar with any gang activity that goes on in the prison," but that inquiry did not happen. (*See* Tr., p.339, L.24- p.340, L.12.) The court characterized Mr. Daniels' concern as being that the current or former IDOC employees would tell the other jurors Mr. Daniels had been in a prison gang and therefore in prison. (*See* Tr., p.340, Ls.13-21.) Because it did not know if the IDOC-related jurors would do so, the district court determined, "So at this point, I can't make a finding that there's been an error or legal defect in the proceedings." (Tr., p.340, Ls.22-25.) Finding such an error, according to the court, would require that the jurors ignore the previously-given jury instruction "which specifically says to the jury that they are not to communicate any private or special knowledge about any of the facts of this case to your fellow jurors." (Tr., p.341, Ls.1-6; *see* Tr., p.147, Ls.17-19.)

The district court determined, "We haven't had a defect or a problem in the legal proceedings at this point, so the Court's going to deny the motion." (Tr., p.341, Ls.12-14.) The court also determined: "And I guess the final grounds for denying the motion at this point is the subject of a gang conflict was brought up by the defense. And I don't know that I can declare a mistrial and essentially hold things against the State for something the defense brought up." (Tr., p.341, L.23 – p.342, L.2.)

Mr. Daniels testified that, while driving with Ms. Hernandez the morning of the incident, he made arrangements to meet Jeff Mangum at a gas station. (*See* Tr., p.398, L.3 – p.40, L.14.)[1] Mr. Mangum asked Mr. Daniels for a ride home to Nampa, but the three ended up at a trailer park on 44th Street. (*See* Tr., p.404, L.20 – p.405, L.10.) Mr. Mangum stated he needed to stop by his friend's house, but at the trailer park, he revealed the house was Mr. Anderson's. (*See* Tr., p.405, Ls.10-24.)

Mr. Daniels testified that he knew Mr. Anderson from a previous incident involving Mr. Daniels' girlfriend. (*See* Tr., p.406, L.3 – p.408, L.8.) Mr. Daniels and his girlfriend, Hailey Mangum, testified that while she was babysitting for a friend and Mr. Daniels was out at a gas station, Mr. Anderson showed up with brass knuckles and threatened her. (*See* Tr., p.388, L.13 – p.391, L.15, p.406, L.12 – p.4.) According to Mr. Daniels, one of Mr. Anderson's friends had accused Mr. Daniels of theft. (*See* Tr., p.408, L.17 – p.409, L.19.) Ms. Mangum testified that she was scared because she knew Mr. Anderson was part of the Severely Violent Criminals (SVC) gang. (*See* Tr., p.393, Ls.5-9.) She testified that Mr. Anderson told her he was in SVC, and he threatened her and her family. (*See* Tr., p.393, Ls.10-16.) Mr. Daniels similarly testified that, after he returned, Mr. Anderson stated he was in SVC and threatened to beat him and kill him and his family. (*See* Tr., p.407, Ls.11-18.) He testified that Derek Tuschoff was also there with Mr. Anderson. (*See* Tr., p.406, L.19 – p.407, L.2.) The verbal altercation ended when Ms. Mangum's friend showed up. (*See* Tr., pp.393-94, p.408, Ls.1-8.)

That prior incident was going through Mr. Daniels' head while he was outside Mr. Anderson's house, and he testified that he told Mr. Mangum about that bad blood. (*See* Tr., p.410, Ls.4-6, p.411, Ls.2-4.) Mr. Mangum stated he had already spoken with

[1] All citations to "Tr." refer to the Reporter's Transcript of Jury Trial, conducted on August 26-28, 2019.

Mr. Anderson, who knew he was in the wrong. (*See* Tr., p.411, Ls.5-10.) Mr. Mangum wanted to clear the air and make things right, and Mr. Daniels said he could go in for a couple minutes. (*See* Tr., p.411, L.12 – p.412, L.3.) He testified that he had a gun in his back pocket, but he did not know the gun was loaded. (*See* Tr., p.414, L.9 – p.415, L.14.) The gun belonged to his employer, who had left it in Mr. Daniels' truck the night before. (*See* Tr., p.412, L.17 – p.414, L.8.)

Mr. Daniels testified that Mr. Anderson and Mr. Mangum were talking when he entered, and Mr. Anderson began yelling at him and asking what he was doing in the house. (*See* Tr., p.415, Ls.15-22.) Mr. Anderson and Mr. Tuschoff, also in the house, immediately recognized Mr. Daniels. (*See* Tr., p.415, L.23 – p.416, L.1.) Mr. Daniels said that Mr. Mangum told him Mr. Anderson wanted to talk with him, but Mr. Anderson ranted that he was in SVC and he would paralyze Mr. Daniels for life. (*See* Tr., p.416, L.20 – p.417, L.5.) Mr. Daniels saw a machete-like knife in the room. (*See* Tr., p.418, Ls.2-23.)

Per Mr. Daniels, he stated he was going to leave, but Mr. Tuschoff cornered him. (*See* Tr., p.417, Ls.9-21.) Mr. Anderson then came towards him and started swinging with his fists. (*See* Tr., p.420, Ls.4-22.) He tried to fend off Mr. Anderson, but Mr. Tuschoff struck him on the left side of his head and knocked him back against a wall. (*See* Tr., p.420, L.18 – p.421, L.8.) As both of them came at Mr. Daniels, he heard the sound of a knife being dragged on a surface. (*See* Tr., p.421, Ls.9-15.)

Mr. Daniels testified that he got scared and went for the gun in his back pocket. (Tr., p.422, Ls.1-4.) He testified that he intended to use the gun to scare them to get away from him, so he and Ms. Hernandez could get out of the house. (*See* Tr., p.422, Ls.5-13.) When he got the gun out, Mr. Tuschoff continued to hit him. (Tr., p.422, Ls.14-16.) Mr. Daniels testified

that he fell back during one of those hits and hit the wall, and the gun went off. (Tr., p.422, Ls.16-18.) Mr. Daniels testified that he did not intend for the gun to go off, and he could not say that he intentionally stuck his finger in the trigger guard. (*See* Tr., p.422, L.19 – p.423, L.4.) When the gun went off, he was not pointing it at anyone. (Tr., p.423, Ls.5-7.) However, he later told Ms. Hernandez in a jail phone call that he intended to shoot a round in the floor. (*See* Tr., p.423, Ls.8-15.)

Mr. Daniels testified that, after the gun went off, Mr. Anderson and Mr. Tuschoff scattered away from him, and he and Ms. Hernandez left the house. (*See* Tr., p.423, L.21 – p.425, L.3.) He jumped into his truck, and the gun was placed in the passenger door panel. (*See* Tr., p.425, Ls.4-12.) He testified that he may have handed the gun to Ms. Hernandez to do that, but he was not sure if she actually took it or not. (*See* Tr., p.425, Ls.13-18.)

The jury found Mr. Daniels guilty of aggravated battery with the use of a firearm or a deadly weapon in the commission of a crime, and Mr. Daniels admitted to the prior offenses underlying the persistent violator sentencing enhancement. (R., pp.88-99, 120.) The district court imposed a unified sentence of ten years, with five years fixed. (R., pp.123-26.)

Mr. Daniels filed a Notice of Appeal timely from the district court's Judgment of Conviction. (R., pp.130-33.)

ISSUE

Did the district court commit reversible error when it denied Mr. Daniels' motion for a mistrial?

ARGUMENT

The District Court Committed Reversible Error When It Denied Mr. Daniels' Motion For A Mistrial

A. Introduction

Mr. Daniels asserts the district court committed reversible error when it denied his motion for a mistrial. Contrary to the district court's determination, Detective O'Gorman's volunteered statement that Mr. Daniels identified himself as a former member of the Aryan Knights was not invited error, because the statement was nonresponsive to defense counsel's question on Mr. Anderson's affiliations. When viewed in the context of the full record, Detective O'Gorman's statement constituted reversible error, despite the district court previously instructing the jurors not to share private or special knowledge with each other. It was extremely prejudicial to have the two jurors currently or formerly employed by IDOC learn that Mr. Daniels was a former prison gang member.

B. Standard Of Review

"A mistrial may be declared on motion of the defendant when there occurs during the trial, either inside or outside the courtroom, an error or legal defect in the proceedings, or conduct that is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a).

As the Idaho Supreme Court has held, "In reviewing a district court's denial of a motion for mistrial in a criminal case, the question is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made." *State v. Johnson*, 163 Idaho 412, 421 (2018) (quoting *State v. Sandoval-Tena*, 138 Idaho 908, 912 (2003). "Rather, the question must be whether the event which precipitated the motion for

mistrial represented reversible error when viewed in the context of the full record." *Id.* "Thus, where a motion for mistrial has been denied in a criminal case, the 'abuse of discretion' standard is a misnomer." *Id.* "The standard, more accurately stated, is one of reversible error." *Id.* The appellate court's "focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion." *Id.* "The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error." *Id.*

C. Detective O'Gorman's Volunteered Statement Was Not Invited Error, Because The Statement Was Nonresponsive

Contrary to the district court's determination, Detective O'Gorman's volunteered statement that Mr. Daniels identified himself as a former member of the Aryan Knights was not invited error, because the statement was nonresponsive to defense counsel's question on Mr. Anderson's affiliations. "The invited error doctrine precludes a criminal defendant from 'consciously' inviting district court action and then successfully claiming those actions are erroneous on appeal." *State v. Abdullah*, 158 Idaho 386, 420 (2015) (quoting *State v. Owsley*, 105 Idaho 836, 837 (1983)). "It has long been the law in Idaho that one may not successfully complain of errors one has acquiesced in or invited. Errors consented, acquiesced in, or invited are not reversible." *Id.* at 420-21. "The purpose of the invited error doctrine is to prevent a party who caused or played an important role in prompting a trial court to take action, from later challenging that decision on appeal." *State v. Barr*, No. 46094, 2020 WL 2488829, at *3 (Idaho May 14, 2020) (citing *State v. Blake*, 133 Idaho 237, 240 (1999)).

1. A Nonresponsive Answer Given During Defense Cross-Examination Of A Witness Is Not Invited Error

Whether an answer given during defense cross-examination of a witness is invited error depends on whether the answer is responsive to defense counsel's question. A volunteered statement that is not a response to any inquiry put to the witness is not invited error. *See State v. Simonson*, 112 Idaho 451 (Ct. App. 1987). In *Simonson*, a felony injury to child case, the defendant initially pleaded guilty, but later withdrew his plea and went to trial. *See id.* at 452. The mother of the alleged victim testified for the State, and described her relationship with the defendant and the incident underlying the charge. *See id.* at 452-53. On cross-examination, the defendant's counsel "pursued a line of inquiry showing that the she had continued to have contact, and to have maintained their relationship, with Simonson after the incident . . . ." *Id.* at 453. Defense counsel then questioned the mother as follows:

> [DEFENSE COUNSEL]: And you have had the kids with him since then?
>
> [WITNESS]: The kids live with me. When Larry comes over, the children are there.
>
> [DEFENSE COUNSEL]: You have gone places, I think you said, didn't you?
>
> [WITNESS]: Initially we did, before he pleaded guilty we went places. After he pleaded guilty and changed his plea—

Id. The defendant's counsel then filed a motion for a mistral, and the district court denied the motion but gave the jury a cautionary instruction. *Id.* The jury ultimately found the defendant guilty, and the district court denied the defendant's motion for a new trial on the basis of prejudice from the mother's reference to the guilty plea. *See id.*

On appeal, the *Simonson* defendant argued that the district court "erred in refusing to grant either the motion for a mistrial or the motion for a new trial, predicated on the reference to his guilty plea." *Id.* The Idaho Court of Appeals acknowledged that evidence of a guilty plea

which was later withdrawn, is generally inadmissible under Idaho Rule of Evidence 410. *See id.* at 454. The *Simonson* Court next held: "Here, in all fairness to the state, we recognize that the reference to Simonson's guilty plea was not adduced by the prosecution as part of its case in chief to prove Simonson's guilt. Neither was it a likely response to any inquiry put to the witness by defense counsel, and thus did not amount to invited error." *Id.* The Court instead held that "the statement was simply volunteered by the witness in explaining certain events that, apparently to her, were related in time." *Id.*

The *Simonson* Court, in light of the great weight of authority concluding that such evidence is inadmissible, held that error occurred. *Id.* The Court observed, "Our decision is supported in particular by cases where such evidence—received as volunteered, non-responsive statements from a witness during trial—has been held to constitute error." *Id.* at 454-56 (citing *State v. Jensen*, 279 P. 506 (Utah 1929); *People v. Bain*, 295 N.E.2d 295 (Ill. App. 1973); *People v. Haycraft*, 221 N.E.2d 317 (Ill. App. 1966)). The Court also did "not believe the cautionary instruction given by the court in this case could have removed the effect of the prejudicial evidence from the minds of the jurors." *Id.* at 457. The *Simonson* Court held that the error may have contributed to the verdict, and reversed the denial of the motion for a new trial. *See id.* at 458.

Conversely, an answer responsive to defense counsel's cross-examination question is deemed invited error. *See Abdullah*, 158 Idaho at 435 ("[S]ome of the allegedly inadmissible statements identified by Abdullah in his brief were elicited by the defense on cross-examination. Abdullah cannot complain of any error in out-of-court statements he elicited."); *State v. Parker*, 157 Idaho 132, 148 n.2 (2014) (noting that a detective's response to cross-examination was invited error, where defense counsel asked if the defendant was being cooperative during an

entire interview, and the detective replied that he was being cooperative, but lying about certain things); *State v. Gleason*, 123 Idaho 62, 66 (1992) ("Appellant cannot now be heard to denounce testimony that he roused.").

One example of an "accurate, fair and responsive answer to defense counsel's question" is found in *State v. Atkinson*, 124 Idaho 816 (Ct. App. 1993), *rev. denied* (Jan. 6, 1994). The defendant in *Atkinson* was found guilty of aggravated battery for allegedly throwing the victim off a train. *See id.* at 817. The defendant allegedly threw another person, Sam Thurman, off the train later, killing that person, as was charged in a separate case. *See id.* at 817 & n.1. During the trial, the victim testified about "the guy that died"; while defense counsel did not object, the district court had the attorneys approach the bench to discuss the line of testimony concerning Sam's death. *See id.* at 817. The district court also instructed a witness that testimony regarding the deceased person being thrown off the train and his subsequent death would not be allow. *See id.* at 817-18. However, during cross-examination, in response to a question by defense counsel, the witness responded, "After he [Atkinson] threw Sam off." *See id.* at 818 (alteration in original). Defense counsel filed a motion for a mistrial, which the district court denied. *Id.*

On appeal, the defendant in *Atkinson* asserted error in the denial of the mistrial motion following the statements of the victim and the witness regarding Sam's ejection from the train and subsequent death. *See id.* The Court of Appeals held that the statements were not admissible under Idaho Rule of Evidence 404(b). *See id.* at 818-19. However, the *Atkinson* Court also held that the testimony "was invited, and therefore the mistrial was properly denied." *Id.* at 819. The Court observed that the witness had previously indicated "that if he was going to be asked about the altercation between himself and Atkinson, he would have to include Sam's ejection from the train because it was part of the entire sequence of events." *See id.* at 819-20.

The district court had also instructed the witness "that he was not to bring up the subject unless specifically asked a question about the circumstances involved." *Id.* at 820.

The *Atkinson* Court stated, "Even during the exchange that brought out the challenged testimony, it appears the witness was trying to avoid discussing Sam but was required to do so in order to respond to inquiry by defense counsel." *Id.* Defense counsel had questioned the witness on whether he had pushed the defendant in the chest after the defendant threw the victim off the train. *Id.* The witness denied doing so, stating, "I didn't—at this time I did not do that." *Id.* at 821. Defense counsel asked, "Did you at any time?" and the witness replied, "Yes, sir." *Id.* Defense counsel then asked, "When?" and the witness answered, "After he threw Sam off." *Id.*

According to the *Atkinson* Court, "The witness gave an accurate, fair and responsive answer to defense counsel's question of 'When?'" *Id.* Defense counsel later "admitted on the record that he did not know what the witness was going to answer in response to that question," and the Court held, "Defense counsel's failure to know the answer to the question or his misunderstanding of the sequence of events does not excuse the invited nature of the error." *Id.* The *Atkinson* Court explained, "A misstep on dangerous ground, where counsel has voluntarily ventured but is unsure of possible responses, may result in invited error, and if so, cannot then be grounds for a mistrial." *Id.*

The defendant in *Atkinson* had cited *Simonson* "for the proposition that inadvertence makes no difference in the prejudicial impact and therefore does not serve as a proper ground for admission." *Id.* The *Atkinson* Court distinguished *Simonson*: "[I]n *Simonson*, the testimony did come in under questioning by the defense, but the answer given was not responsive to the question asked. Defense counsel in *Simonson* asked a specific question expecting a certain answer when the witness instead volunteered evidence of a prior guilty plea." *Id.* The *Atkinson*

Court held: "This Court ruled in *Simonson* that the testimony was not, therefore, invited error. In this case, the answer given was responsive, and, thus, the error was invited, distinguishing *Simonson*." *Id.* Thus, the *Atkinson* Court held the district court properly denied the motion for a mistrial. *Id.*

2. Detective Gorman's Volunteered Statement Was Nonresponsive, And Therefore Was Not Invited Error

Like the error in *Simonson*, and contrary to the district court's determination, the error here was not invited because Detective Gorman's volunteered statement was nonresponsive. The exchange during the cross-examination of Detective Gorman was as follows:

> Q. Okay. There was some discussion in your—well, you wrote down in your police report about what John characterized Chris to be a member of something?
>
> A. Yes, sir.
>
> Q. Are you familiar with what he was talking about?
>
> A. Yes, sir.
>
> Q And what was that?
>
> A. He classified him as being a member of the SVC, Which is a gang.
>
> Q. Okay.
>
> A. Daniels also identified himself as an Aryan Knight dropout.
>
> Q. Okay. So are you familiar with those two gangs and the animosity between the two?
>
> A. Yes, sir.

(Tr., p.313, L.19 – p.314, L.9.) During redirect examination, Detective O'Gorman clarified that Mr. Daniels was referring to himself as an Aryan Knight dropout. (Tr., p.331, Ls.14-22.)

As a preliminary matter, Detective O'Gorman's volunteered statement is inadmissible prior acts evidence under Idaho Rule of Evidence 404(b), much like the evidence of the defendant in *Atkinson* throwing Sam off the train. *See* I.R.E. 404(b). As the United States Court of Appeals for the Eighth Circuit put it, "While evidence of gang membership is admissible if relevant to a disputed issue, gang affiliation evidence is not admissible where it is meant merely to prejudice the defendant or prove his guilt by association with unsavory characters." *United States v. McKay*, 431 F.3d 1085, 1092 (2005) (alteration, citation, and internal quotation marks omitted). Here, the State did not articulate a non-propensity purpose for admitting the statement that Mr. Daniels identified himself as a former Aryan Knights member. (*See* Tr., p.337, Ls.12-24.) Moreover, the State had not provided the requisite Rule 404(b) notice of intent to present such prior acts evidence. *See* I.R.E. 404(b). Thus, Detective O'Gorman's volunteered statement was inadmissible.

Turning to whether Detective Gorman's volunteered statement was invited error, his statement was not invited because it was not responsive to the question asked by Mr. Daniels' counsel. Like in *Simonson*, defense counsel here "asked a specific question expecting a certain answer . . . ." *See Atkinson*, 124 Idaho at 821. Mr. Daniels' counsel asked Detective O'Gorman, "you wrote down in your police report about what John characterized Chris to be a member of something?" followed by, "Are you familiar with what he was talking about?" and, "And what was that?" (Tr., p.313, L.19 – p.314, L.1.) This line of questioning from defense counsel was not open-ended, nor did it call for the objectionable answer. Mr. Daniels' counsel told the district court: "I did not ask specifically what Mr. Daniels associated himself with or had been associated with." (Tr., p.338, Ls.4-6.)

Detective O'Gorman answered that Mr. Daniels classified Mr. Anderson "as being a member of the SVC, which is a gang," but followed that answer with the volunteered statement, "Daniels also identified himself as an Aryan Knight dropout." (Tr., p.314, Ls.2-6.) The volunteered statement on Mr. Daniels' identification was nonresponsive to this line of questioning, which called for an answer on Mr. Anderson's affiliations. (*See* Tr., p.313, L.19 – p.314, L.1.) Thus, like the volunteered, nonresponsive answer in *Simonson*, Detective O'Gorman's volunteered statement was nonresponsive. *See Simonson*, 112 Idaho at 454.

Because Detective O'Gorman's volunteered statement that Mr. Daniels identified himself as a former Aryan Knights member was not responsive to the question asked by defense counsel, his statement was not invited error. *See Atkinson*, 124 Idaho at 821; *Simonson*, 112 Idaho at 454. The district court therefore erred when it denied Mr. Daniels' motion for a mistrial on that basis.

D. Detective O'Gorman's Volunteered Statement Constituted Reversible Error

When viewed in the context of the full record, Detective O'Gorman's volunteered statement constituted reversible error, despite the district court previously instructing the jury not to share special knowledge with each other. As seen above, the question here is "whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record." *Johnson*, 163 Idaho at 421. The reviewing court's "focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion." *Id.* "The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error." *Id.*

The *Johnson* Court also held, "The admission of improper evidence does not automatically require the declaration of a mistral." *Id.* at 422 (quoting *State v. Hill*, 140 Idaho 625, 631 (Ct. App. 2004)) (internal quotation marks omitted). Additionally, "Error in admission

of evidence may be cured by proper instruction, and it must be presumed that the jury obeyed the trial court's direction." *Id.* (quoting *State v. Tolman*, 121 Idaho 899, 905-06 n.6 (1992)) (internal quotation marks omitted).

In *Johnson*, a lewd conduct with a minor child under sixteen case, the defendant moved for a mistrial after a detective, on direct examination by the State, responded to a question on who he had interviewed in his investigation by stating he had tried to interview the defendant. *See id.* at 416, 421. The district court sustained the defendant's objection and struck the answer as an impermissible comment on the defendant's invocation of his right to remain silent. *See id.* at 421. However, the district court deferred ruling on the motion for a mistrial, and instead proceeded with the trial after giving a curative instruction to the jury. *See id.* The district court later denied the motion for a mistrial. *Id.*

On appeal, the *Johnson* Court held the district court correctly sustained the objection and struck the detective's answer as an impermissible comment on the defendant's right to remain silent. *Id.* at 422. The Court then wrote, "Due to the district court's curative instruction, we hold the district court did not err in denying the motion for mistrial." *Id.* The Court observed that the entirety of the stricken comment was that the detective tried to interview the defendant, and the prosecution did not encourage or invite the jury to draw any inferences therefrom. *Id.*

After the detective in *Johnson* made the impermissible comment, "the court granted a curative instruction which informed the jury: 1) of the right to silence; 2) that a defendant was entitled to invoke that right; 3) it was to disregard the detective's comment; and 4) to draw no further inferences from the stricken comment." *Id.* The *Johnson* Court held," There is no reason in the record to believe that the jury ignored this instruction and drew impermissible inferences of guilt from the stricken comment." *Id.* Thus, the Court presumed the jury followed the

curative instruction in its entirety, and held the events that precipitated the motion for a mistrial did not represent a reversible error. *Id.*

In contrast to the impermissible comment in *Johnson*, when viewed in the context of the full record, Detective O'Gorman's statement constituted reversible error, despite the district court previously instructing the jurors not to share private or special knowledge with each other. This is because of the extremely prejudicial effect of the statement, which injected propensity or character evidence into the trial. (*See* Tr., p.336, L.17 – p.337, L.2, p.338, Ls.10-14.) The Idaho Supreme Court has noted, "Rules of Evidence such as 404 . . . recognize implicitly that previous bad acts . . . are prejudicial." *State v. Bingham*, 124 Idaho 698, 701 (1993). "The prejudicial effect of [character] evidence is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *State v. Grist*, 147 Idaho 49, 52 (2008) (quoting *State v. Wrenn*, 99 Idaho 506, 510 (1978)) (internal quotation marks omitted) (alteration in original). "Character evidence, therefore, takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial." *Id.* (citing *Wrenn*, 99 Idaho at 510).

Prior acts evidence of gang affiliation is particularly prejudicial. The Eighth Circuit has observed, "To be certain, there is great potential for prejudice when evidence regarding gangs is at issue." *United States v. Bradford*, 246 F.3d 1107, 1117 (8th Cir. 2001). The Georgia Court of Appeals affirmed a trial court's ruling that gang evidence was inadmissible, where the trial court reasoned "that it was not willing to insert the extremely prejudicial issue of gang membership into the case since the evidence did not clearly establish that the incident was gang related." *Redding v. State*, 733 S.E.2d 383, 387 (Ga. Ct. App. 2012).

Here, through Detective O'Gorman's voluntary statement, the two jurors currently or formerly employed by IDOC learned that Mr. Daniels was a former prison gang member. Defense counsel asserted that the Aryan Knights was a prison gang that was well known in the prison. (*See* Tr., p.336, Ls.23-24.) Thus, it was likely that the jurors currently or formerly employed by IDOC knew of the nature of the Aryan Knights, as well as the implications of Mr. Daniels identifying himself as an Aryan Knight dropout. That is especially the case with respect to Juror 3, who had been a correctional shift commander, investigator, and who looked into rule violations as serious as those involved in felony criminal investigations. (*See* Tr., p.92, Ls.12-18.)

The district court determined it did not know if the jurors currently or formerly employed by IDOC would tell the other jurors that Mr. Daniels had been a prison gang and in prison. (*See* Tr., p.340, Ls.22-23.) Per the court, that would require the jurors to ignore the previously-given jury instruction that they were not to share any private or special knowledge about the facts of the case. (Tr., p.341, Ls.1-7.) The district court had instructed the jurors, "Do not communicate any private or special knowledge about any of the facts of this case to your fellow jurors." (R., p.103; Tr., p.147, Ls.17-19.)

However, Mr. Daniels' counsel expressed specific concerns about the two IDOC-related jurors: "And so now it has come to light about Mr. Daniels, these two jurors know that he's either been to prison or is in prison." (Tr., p.337.) The district court had also instructed the jurors:

> You bring with you to this courtroom all the experience and background of your lives. In your everyday affairs, you determine for yourselves whom you believe, what you believe, and how much weight to attach to what you were told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

(R., p.98; Tr., p.143, Ls.7-14.) The above language matches language in the pattern criminal jury instructions. *See* ICJI 104. The Idaho Supreme Court has held: "we also 'expect jurors to bring with them to jury service their background, knowledge and experience.' *Miller v. Hailer*, [129 Idaho 345, 350] (1996); *see also* ICJI 104. Such information is not considered extraneous information. *Miller*, 129 Idaho at 350. Indeed, we encourage jurors to use their life experiences when evaluating testimony. ICJI 104." *State v. Payne*, 146 Idaho 548, 566 (2008).

Because jurors are presumed to follow jury instructions, if the two jurors currently or formerly employed by IDOC followed the jury instruction to not communicate any private or special knowledge to the jurors, they would have also followed the instruction to use their life experiences when evaluating testimony. *See Johnson*, 163 Idaho at 421. Thus, it is likely that the two jurors currently or formerly employed by IDOC considered Detective O'Gorman's volunteered statement that Mr. Daniels identified himself as a former Aryan Knights member, meaning Mr. Daniels had been in a prison gang and in prison, while weighing the case.

The full record in this case also includes the overall weakness of the evidence supporting the State's theory that Mr. Daniels intentionally shot Mr. Anderson. Mr. Daniels testified that he did not intend for the gun to go off. (*See* Tr., p.422, Ls.19-21.) He also testified that, when the gun went off, he was not pointing it at anyone. (*See* Tr., p.423, Ls.5-7.) No witness testified to seeing Mr. Daniels aim the gun at Mr. Anderson. Mr. Anderson did not testify. (*See generally* Tr.) Ms. Hernandez and Ms. Clark, the witnesses in the house at the time of the shooting, testified they did not see the shot. (*See* Tr., pp.169, Ls.4-9, p.368, L.18 – p.369, L.6.)

Thus, when viewed in the context of the full record, Detective O'Gorman's volunteered statement constituted reversible error. *See Johnson*, 163 Idaho at 421. The district court committed reversible error when it denied Mr. Daniels' motion for a mistrial. This Court should

therefore vacate the district court's order denying the motion for a mistrial and Mr. Daniels' judgment of conviction, and remand this matter for further proceedings.

CONCLUSION

For the above reasons, Mr. Daniels respectfully requests that this Court vacate the district court's denial of his motion for a mistrial and his judgment of conviction, and remand this matter for further proceedings.

DATED this 9th day of October, 2020.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
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BPM/eas